Petition

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No.

IN THE

Supreme Court of the United States

October Term, 1981

ZELDA L. PANZIRER,

Petitioner,

v.

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER AND PRICE WATERHOUSE & CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 23(a)(4) of the Federal Rules of Civil Procedure ("FRCP"), the District Court, in ruling on the adequacy of a class representative, may deny class certification solely because of subjective doubts about the representative plaintiff's personality?

2. Issues implicit in that question are:

A. Whether the adequacy of representation requirement of Rule 23(a)(4), which is in part a due process safeguard, is an objective test intended to prevent potential conflicts of interest between the class representative and the members of the class or a subjective test inviting district courts to evaluate the personal characteristics of the class representative having nothing to do with the claim?

B. Whether the purpose of Rule 23(a)(4) is to assure that the representative party is motivated to pursue the action vigorously because her interests are common to those of the members of the class regardless of character defects of the representative party?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Zelda L. Panzirer petitions for a writ of certiorari to review that part of the judgment of the United States Court of Appeals for the Second Circuit entered on October 28, 1981 affirming an order of the United States District Court for the Southern District of New York refusing to certify this action as a class action.

The Court of Appeals ruled that a district court could deny class certification solely because it found distasteful subjective personal character traits of the proposed class representative, having nothing to do with the issues in the case. This ruling places the federal judiciary in the awkward position of determining who is a "good" or "bad" person as a prerequisite to adjudication of federal claims and controversies -- a condition precedent nowhere found in the Constitution, jurisdictional statutes, or the Federal Rules of Civil Procedure.

QUESTIONS PRESENTED FOR REVIEW

1. Whether under Rule 23(a)(4) of the Federal Rules of Civil Procedure ("FRCP"), the District Court, in ruling on the adequacy of a class representative, may deny class certification solely because of subjective doubts about the representative plaintiff's personality?

2. Issues implicit in that question are:

A. Whether the adequacy of representation requirement of Rule 23(a)(4), which is in part a due process safeguard, is an objective test intended to prevent potential conflicts of interest between the class representative and the members of the class or a subjective test inviting district courts to evaluate the personal characteristics of the class representative having nothing to do with the claim?

B. Whether the purpose of Rule 23(a)(4) is to assure that the representative party is motivated to pursue the action vigorously because her interests are common to those of the members of the class regardless of character defects of the representative party?

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, 663 F.2d 365 (2d Cir. 1981), is included as Appendix A. The District Court rendered two opinions dated respectively, January 16, 1980, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,251 (S.D.N.Y. 1980), and April 21, 1980, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,363 (S.D.N.Y. 1980), which are included as Apendices B and C, respectively.

The District Court granted defendant-respondents' motion for summary judgment dismissing this action and denied plaintiff-petitioner's class certification motion. The Court of Appeals reversed the grant of summary judgment but affirmed the ruling on class certification on different grounds.

JURISDICTION

The Court of Appeals issued its opinion and entered a judgment on October 28, 1981. A petition for rehearing and suggestion for rehearing *in banc* was denied on January 28, 1982. This Petition is filed within ninety days of the denial of the petition for rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

PROVISIONS OF FEDERAL RULE OF CIVIL PROCEDURE 23(a)(4)

"One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."

STATEMENT OF THE CASE

The facts set forth below are taken from the opinion of the Court of Appeals.

Mrs. Panzirer's Stock Purchases

In September 1978, Allied Artists Industries, Inc. ("Allied") issued its 1978 Annual Report which petitioner contends is fraudulently false and misleading with regard to Allied's financial condition and prospects. Thereafter, on September 28, 1978, Mrs. Panzirer purchased shares of Allied common stock (the "Shares"), upon reading an article in *The Wall Street Journal* recommending Allied as a turnaround situation.

She did not read the Annual Report prior to purchasing the Shares.

The "Heard on the Street" column in the *Journal* covered the video cassette market and devoted two paragraphs to Allied:

> "Several analysts contend that Allied Artists is in a good position to take advantage of the growing demand for video tapes, having pioneered the development of prerecorded cassettes.

> "Andrew G. Racz of Philips, Appel & Walden, Inc. says Allied Artists, besides having a head start in video tapes and cassettes, is negotiating with TV networks, other film producers and makers of educational films to put their films on video cassettes. 'The educational and informational area constitutes a tremendous market for video cassettes,' says Mr. Racz, adding: 'We continue to be bullish on Allied Artists. It's an attractive turnaround situation.'"

Zelda Panzirer had been a substitute school teacher. The item on the educational use of video cassettes caught her eye. She checked the price of Allied common stock which was listed on the American Stock Exchange and had traded at between $5 and $6⅛ on September 28th. Zelda Panzirer called her broker, Michael Blum, at E.F. Hutton's office in Hackensack, New Jersey. She asked if there was any negative news about Allied. Mr. Blum said that neither he nor E.F. Hutton followed the company, but after several minutes delay and a glance at Standard & Poor's tear sheet on Allied, said there was no negative news. Zelda Panzirer ordered 200 Shares of Allied common stock. Later, after discussing the purchase with her husband, she phoned Mr. Blum a second time to increase her order to 500 Shares. E.F. Hutton purchased the Shares for Mrs. Panzirer at a September 29th market price of $7 per Share.

The Fraud

Standard & Poor's tear sheet abstracted information from Allied's annual report for the fiscal year ending March 31, 1978. The annual report, issued on September 8, 1978, allegedly contained numerous misrepresentations and omissions. The principal alleged misrepresentation was the report of profits for that year based in part on full receipts from Allied's film, "The Betsy." In fact, Allied was required to split those receipts with the film's overseas distributor, United Artists and thus lost money in 1978.

The principal alleged omission was the failure of the annual report to include a qualification by Allied's accountants stating

their doubts as to Allied's ability to function as a going concern. Originally the defendant accountants had qualified their opinion but withdrew their qualification under pressure prior to the publication of the annual report.

Allied common stock closed at $2⅞ per Share on the day the annual report was issued. It rose precepitously in the next few weeks and peaked at $7⅜ per Share on October 2, 1978.

Six months later Allied was bankrupt; the Shares are worthless today.

In her complaint, Mrs. Panzirer alleged that in making her purchase she relied on the "integrity of the market" for Allied's Shares. She asserts that the annual report affected the market and, therefore, she relied on the report through her reliance on the integrity of the market.

The District Court's Opinion on Reliance

The District Court found that Mrs. Panzirer "primarily" relied on *The Wall Street Journal* column about Allied's prospects in the video cassette market and that she placed only secondary reliance on the integrity of the market. The District Court held that secondary reliance was insufficient to support a Rule 10b-5 claim. The Court of Appeals disagreed finding no support in the law for the District Court's distinction between primary and secondary reliance.

The Court of Appeals Opinion on Reliance

The Court of Appeals concluded from the record that Zelda Panzirer's purchase of Allied Shares was caused by her perusal of *The Wall Street Journal* column. Her knowledge of the price of the stock and her conversation with her broker, according to the Court of Appeals, were merely neutral factors and presented no impediment to her acting on the favorable notice in *The Wall Street Journal*. Consequently, the Court of Appeals concluded that with regard to reliance and causation, Mrs. Panzirer could argue that if Allied's reports had been accurate, the stock analysts

interviewed by the *Journal* would not have mentioned the company favorably, the *Journal* would not have devoted two paragraphs to Allied's prospects and petitioner would not have been led by the article to buy her stock.

Thus, the Court of Appeals held that "[w]here the plaintiff acts upon information from those working in or reporting on the securities markets, and where that information is circulated after a material misrepresentation or omission, plaintiff has stated a sufficient claim of reliance on the misrepresentation or omission."

The Court of Appeals, therefore, reversed the grant of summary judgment to respondents.

Denial of Class Certification

Although ruling that Mrs. Panzirer had a claim which was required to be tested at trial, the Court of Appeals affirmed the denial of class certification.

The District Court ruled that the weakness of petitioner's claim concerning her reliance made her claim atypical under Rule 23(a)(3). In addition, in discussing the motion for summary judgment, the District Court concluded that Mrs. Panzirer lacked credibility and that this factor would also have made her an inadequate class representative under Rule 23(a)(4) FRCP.

The Court of Appeals affirmed the denial of class certification only on the latter ground. In the view of the Court of Appeals:

> "Plaintiff's lack of credibility is abundantly clear in the record. She had no less than four versions of her conversation with her broker. At her deposition, she described the conversation as containing no specific information about Allied. Before signing her deposition, she changed her story to say that Michael Blum had read unspecified information to her from his Standard & Poor's tear sheet. In her affidavit explaining her changes in testimony, she alleged that he had told her that Allied had made money in 1978. After defendants introduced an affidavit from the broker that he had never looked at the financial information on Allied in the tear sheet, Zelda Panzirer introduced a final affidavit alleging that he had read financial information to her from the tear sheet. *The credibility of*

> *a plaintiff may be considered by the trial judge in determining the plaintiff's adequacy as a class representative. Kline v. Wolf*, 88 F.R.D. 696, 699-700 (S.D.N.Y. 1981); C. Wright & A. Miller, Federal Practice & Procedure §1766 at 632-34. *Judge Motley acted well within her discretion in concluding that Zelda Panzirer's lack of credibility rendered her an inadequate class representative.*" (emphasis added).

In our view the Court of Appeals misapplied the standards of Rule 23(a)(4).

REASONS FOR GRANTING THE WRIT

Federal district courts wrestle daily with problems relating to certification and management of class actions.

Class action procedures were expanded in 1966 by an amendment of Rule 23 to more readily enable the vindication of wrongs where damages to the individual may not economically justify an action.

In *Escott v. Barchris Construction Corp.*, 340 F.2d 731, 733 (2d Cir.), *cert. denied sub nom., Drexel & Co. v. Hall*, 382 U.S. 816 (1965), the court wrote:

> "In our complex modern economic system where a single harmful act may result in damages to a great many people there is a particular need for the representative action as a device for vindicating claims which, taken individually, are too small to justify legal action but which are of significant size if taken as a group."

Nevertheless, or perhaps because of the great demand and extra responsibilities class actions may place on the trial courts, there is a recently perceived development of a general reluctance on the part of the courts to enter the thicket of class actions.

Recently a New York State appellate court discussed in depth what it perceived to be a general reluctance of trial court judges to approve class actions and remarked on the ambivalent attitude of the trial bench towards class actions. In *Friar v. Vangard Holding Corp.*, 78 A.D.2d 83, 434 N.Y.S. 2d 698 (2d Dep't. 1980),

the court viewed with disfavor a general attitude in the lower courts to interpret narrowly the class action rules which, in the court's view, was probably caused by judicial reluctance to face the extra managerial functions that class actions impose on the trial court:

> "By construing the availability of the class action relief narrowly, the judiciary is seen as denying access to the courts to thousands of individuals whose minimal damages are greatly outweighted by the prohibitive costs involved in presenting a lawsuit against a wealthy opponent...." *Id.* at 95, 434 N.Y.S. 2d at 706.

While there is merit in limiting access to the federal courts to those with genuine federal disputes and controversies, the securities fraud claim alleged here certainly is a federal claim. On the other hand, if federal courts become embroiled in character analysis each time class certification is sought, the disputes before the courts, and the judge's task, will be made ever more protracted and insuperable. Courts will be invited to determine charges of personal misconduct on the part of a potential class representative. The personal, financial and legal histories of the representative party will be fair game for the opponents of class certification. Ultimately these issues will require judicial determination.

"Adequacy" under Rule 23(a)(4) was not intended to test the representative plaintiff's personal character. Rather, the adequacy standard was established to assure due process of law to enable the class action judgment to bind the absent, nonparty members of the class. The district courts should limit their examination to potential conflicts of interest between the representative party and the members of the class. The Second Circuit's opinion, allowing the district courts to withhold class action certification based upon the district court's perception of alleged character defects of the representative plaintiff, extends the adequacy requirement beyond conflict of interest analysis to a subjective determination of character. This examination is not envisioned by Rule 23 and certainly not required by the Constitution.

We respectfully submit that the ruling of the Court of Appeals is in conflict with the requirements of Rule 23(a)(4) and the standards established by other circuits.

We believe this Court should grant this petition for certorari for the following reasons suggested by the Supreme Court Rule 17:

> "(a) ... a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter ..." and
>
> "(b) ... a Federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

ARGUMENT

THE COURTS BELOW WERE IN ERROR IN MAKING A SUBJECTIVE EVALUATION OF THE REPRESENTATIVE PLAINTIFF'S CHARACTER IN DETERMINING THE ADEQUACY OF REPRESENTATION UNDER RULE 23(a)(4)

The requirement of "adequacy" of representation found in Rule 23(a)(4) FRCP is founded upon the due process clause of the United States Constitution. "Developments in the Law—Class Actions," 89 Harv. L. Rev. 1318, 1471 (1976). This constitutional standard of adequacy has nothing to do with the district court's view of a plaintiff's personal characteristics.

Rule 23(a)(4) provides as follows:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if... (4) the representative parties will fairly and adequately protect the interests of the class."

The issue submitted to this Court is whether in determining if a representative party "will fairly and adequately protect the interests of the class" under the due process clause and Rule 23(a)(4), the district court may deny class certification based solely upon the personal characteristics of plaintiff.[1]

Due process requires that a class plaintiff adequately represent the interests of the class in order for a class action judgment to bind absent and purported members of the class. "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present." *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940). *See* "Developments In the Law - Class Actions," 89 Harv. L. Rev. 1318, 1411 (1976). In furtherance of this principle, Rule 23(a)(4) mandates a finding that the representative party will "fairly and adequately protect the interests of the class."

Any analysis of the adequacy of representation requirement in class actions must begin with the Supreme Court's decision in *Hansberry v. Lee*, 311 U.S. 32 (1940), a suit brought to enforce a racially restrictive covenant for a community.

The Illinois Supreme Court upheld enforcement of the covenant on a theory of *res judicata* over defendants' objections that the agreement was invalid for want of the requisite number of signers. *Lee v. Hansberry* 372 Ill. 369, 24 N.E. 2d 37 (1939). The court relied on the judgment in an earlier suit, *Burke v.*

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1. The opinion of the Court of Appeals rendered plaintiff's credibility concerning her conversation with her broker irrelevant. The Court noted that whether Mrs. Panzirer relied on Allied's financial statements or financial information is not of importance because of her undisputed testimony that she relied upon the integrity of the market reflected in the analysis contained in *The Wall Street Journal*. 663 F.2d at 367.

The Court found that Mrs. Panzirer's "knowledge of the price of the stock and her conversation with her broker were merely neutral factors," and that Mrs. Panzirer "did rely on the integrity of the market in producing the information reported in *The Wall Street Journal*." *Id.* Mrs. Panzirer's conversation with her broker is not pertinent to the litigation or to the issue of class certification.

Accordingly, any dispute concerning conversations with her broker could not serve as a bar to Mrs. Panzirer's serving as an adequate class representative.

Kleiman, 277 Ill. App. 519 (1934), an action to enforce the covenant, where plaintiffs and defendants stipulated that sufficient signatures were obtained to bring the covenant into effect. *Id.* at 522. *Burke* was a class suit on behalf of all owners of property governed by the covenant, including Hansberry. The Illinois Supreme Court concluded that because the *Hansberry* defendants had been members of the plaintiff class in *Burke*, they were bound by the stipulation. *Id.* at 373, 24 N.E.2d at 39. The United States Supreme Court reversed. 311 U.S. at 46. Chief Justice Stone's opinion held that the stipulation in the first suit did not bar the *Hansberry* defendants from challenging the validity of the covenant because "[i]n seeking to enforce the agreement the plaintiffs in [the first] suit were not representing the [*Hansberry* defendants] whose substantial interest is in resisting performance [of the covenant]." *Id.* at 45-46. Thus, this Court found that due process required a commonality of interest between the class representative and all class members before absentee class members may be bound by the judgment.

More recently in *Sosna v. Iowa*, 419 U.S. 393, 403 (1975), this Court reiterated the rule by stating that "where it is unlikely that segments of the class appellant represents would have interests conflicting with those she has sought to advance, and where the interests of that class have been competently urged at each level of the proceeding, we believe the test of Rule 23(a) is met." (footnote omitted).

Other opinions of the Supreme Court analyze whether the interests of the representative party are coextensive with the interests of the members of the class and whether the plaintiff's interests are antagonistic in any way to the interests of those he seeks to represent. For example, in *East Texas Motor Freight v. Rodriquez*, 431 U.S. 395, 404 (1977), the Court noted:

> "As this Court has repeatedly held, a class representative must be part of the class and 'possess the same interests and suffer the same injury as the class members.'"

See also Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 216 (1974); *Kremens v. Bartley*, 431 U.S. 119, 131 n.12 (1977).

The courts of appeals throughout the country have followed the analysis developed by the Supreme Court and are in unanimous agreement that adequate representation under Rule 23(a)(4) depends on two factors:

> "(a) The plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagnostic to those of the class."

Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975). *See also, Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968); *Scott v. University of Delaware*, 601 F.2d 76, 84 and n. 17 (3d Cir.), *cert. denied*, 441 U.S. 931 (1979); *Gonzales v. Cassidy*, 474 F.2d 67, 72 (5th Cir. 1973); *Bailey v. Ryan Stevedoring Co.*, 528 F.2d 551, 553 (5th Cir.), *rehearing den.*, 533 F.2d 976 (5th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977); *Senter v. General Motors Corp.*, 532 F.2d 511, 524-25 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976); *Cross v. Nat'l Trust Life Ins. Co.*, 553 F.2d 1026, 1031 (6th Cir. 1977); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977); *Serwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Social Services Union, Local 535, Services Employees International Union, AFL-CIO v. County of Santa Clara*, 609 F.2d 944 (9th Cir. 1979); *Jordan v. County of Los Angeles*, 669 F.2d 1316, 1323 (9th Cir. 1982); *Nat'l Assoc. of Regional Medical Programs, Inc. v. Matthews*, 197 U.S. App. D.C. 154, 159, 551 F.2d 340, 345 (1976), *cert denied*, 431 U.S. 954 (1977); 3B Moore's Federal Practice ¶23.07[1] pp. 23-215.

The Third Circuit most recently reaffirmed these principles when it held that "the requirements of *Wetzel* are sufficient to insure adequate representation" and specifically declined to

require any further inquiry into the personal characteristics of the representative plaintiff. *Lewis v. Curtis*, ____ F.2d ____, No. 80-0125 (3d Cir. March 3, 1982) (slip op. at 19).

Here, the Second Circuit departed from this established constitutionally rooted conflict of interest analysis of "adequacy" developed by the Supreme Court and applied by the other circuits.[2] Instead the Court of Appeals invited the district courts to consider the personal characteristics of the representative plaintiff extraneous to the claims in the case.

Conflict of interest analysis is an objective standard by which the adequacy of class representation can be judged. The Court of Appeals has now permitted the district court to apply a subjective standard: whether in the view of the district court the class representative is a "good" person. We submit that the opinion of the Court of Appeals undermines the historically and constitutionally grounded requirement that courts apply objective, neutral standards and not import their own personal prejudices into their rulings. The Court of Appeals has opened the door to every prejudice and judicial predilection by applying a subjective test of personal character to the issue of adequacy.

We readily acknowledge that Mrs. Panzirer is not the perfect class representative. The Supreme Court, however, has cautioned against imposing too high a standard on a representative plaintiff. In *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363 (1966), this Court noted that an unsophisticated plaintiff could verify a complaint in a corporate derivative action, a form of class action under former Rule 23(b), charging complex fraudulent misconduct by the directors of the defendant corporation, although she knew nothing about the contents of the suit. The Supreme Court rejected the proposition that a person uneducated and illiterate in economic affairs could not be a plaintiff in a derivitive suit brought to protect her stock interests. *Id.* at 372.

Mrs. Panzirer, by herself and through her counsel, is fully capable of fulfilling her responsibilities as class representative.

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2. The new rule adopted by the Second Circuit is antagonistic to its own earlier decisions. *See Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).

The District Court did not conclude that Mrs. Panzirer would not vigorously assert the interest of the class she seeks to represent, nor did it conclude that her interests or claims were antagonistic to those of other class members. We believe that the denial of class certification merely because the Court found Mrs. Panzirer's alleged personal characteristics to be distasteful constituted a misinterpretation of Rule 23(a)(4).

CONCLUSION

The decision of the Court of Appeals for the Second Circuit allowing discretion of the District Court to pass upon personal characteristics of a representative plaintiff to determine the adequacy of representation under Rule 23(a)(4) is a grave departure from normal judicial practice developed over many years under the guidance of this Court. It is respectfully submitted that the petition for certiorari be granted to review that decision.

Dated: New York, New York
April 26, 1982

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3. Mr. Isquith is not admitted to practice before the Supreme Court.

Appendix

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 10 August Term, 1981

Argued: September 16, 1981 Decided: October 28, 1981

Docket No. 80-7827

ZELDA L. PANZIRER,

Plaintiff-Appellant,

-against-

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Defendants-Appellees.

Before: LUMBARD and KAUFMAN, *Circuit Judges,* and PIERCE, *District Judge.** Plaintiff appeals from a decision in the Southern District of New York, Motley, J., denying her petition for class certification and dismissing her suit under § 10(b) and Rule 10b-5 of the Exchange Act, 15 U.S.C. 78j(b), 17 C.F.R. § 240.10b-5, for failure to show reliance on the allegedly fraudulent annual report issued and certified by defendants.

* Honorable Lawrence W. Pierce, United States District Judge for the Southern District of New York, sitting by designation.

Reversed as to the grant of summary judgment against plaintiff; affirmed as to the denial of class certification.

DANIEL W. KRASNER, ESQ., New York, N.Y. (Wolf Haldenstein Adler Freeman & Herz, New York, N.Y., Fred Taylor Isquith, Esq., of counsel), for Plaintiff-Appellant.

BARTLETT H. MCGUIRE, ESQ., New York, N.Y. (Davis Polk & Wardwell, New York, N.Y., Ogden N. Lewis, Esq., Jamie Stern, Esq., Susan P. Johnston, Esq., of counsel), for Defendant-Appellee Price Waterhouse & Co.

JACOBS PERSINGER & PARKER, New York, N.Y. (Irving Parker, Esq., Joseph N. Salomon, Esq., William Lasher, Esq., of counsel), for Defendants-Appellees Wolf, Feldman, Lurie, Prager, Proietto and Sattinger.

GORDON HURWITZ BUTOWSKY BAKER WEITZEN SHALOV & NEEDELL, New York, N.Y., for Defendant-Appellee Holloway.

LUMBARD, *Circuit Judge:*

Allied Artists Industries, Inc., issued an allegedly false annual report in August 1978. Zelda Panzirer purchased Allied stock thereafter upon reading an article in The Wall Street Journal. She never saw the annual report. When Allied started bankruptcy proceedings in 1979, she sued Allied officers and Price Waterhouse & Co., Allied's accountants, under § 10(b) and Rule 10b-5 of the Exchange Act, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5. She also sought to represent the class of investors purchasing Allied stock after release of the annual report. The district court, per Motley, J., dismissed Zelda Panzirer's suit on summary judgment and denied class certification on the ground that she had failed to show that reliance on the annual report caused her loss. We reverse in part and affirm in part. Plaintiff relied on an article in The Wall Street Journal which she claims would have presented the company in a less favorable light had the annual report been accurate. She has stated a causal connection between her loss and the annual report which, on this record, cannot be dismissed on summary judgment. We affirm, however, the denial of class certification as being within the discretion of the district court.

On this appeal from summary judgment, the allegations of the complaint, as supplemented by plaintiff's deposition and numerous affidavits submitted by all parties, describe the story of Zelda Panzirer's losing investment in Allied common stock. She read about Allied in The Wall Street Journal while driving up to Vermont on September 29, 1978. The "Heard on the Street" column in that day's Journal covered the video cassette market, and devoted two paragraphs to Allied:

> Several analysts contend that Allied Artists is in a good position to take advantage of the growing demand for video tapes, having pioneered the development of prerecorded cassettes.
>
> Andrew G. Racz of Philips, Appel & Walden, Inc. says Allied Artists, besides having a head start in video tapes and cassettes, is negotiating with TV networks, other film producers and makers of educational films to put their

> films on video cassettes. "The educational and informational area constitutes a tremendous market for video cassettes," says Mr. Racz, adding: "We continue to be bullish on Allied Artists. It's an attractive turnaround situation."

Zelda Panzirer had been a substitute school teacher. The item on the educational use of video cassettes caught her eye. She checked the price of Allied common stock, which was listed on the American Stock Exchange and had traded at between $5 and $6⅛ on September 28. Her husband Leo Panzirer stopped the car. Zelda Panzirer called her broker, Michael Blum, at E. F. Hutton's office in Hackensack, N.J. She asked if there was any negative news about Allied. Blum said that neither he nor E. F. Hutton followed the company, but after several minutes delay and a glance at Standard & Poor's tear sheet on Allied, said there was no negative news. Zelda Panzirer ordered 200 shares of Allied common stock. Later on her trip, after discussing the purchase with her husband, she phoned Blum a second time to raise her order to 500 shares. E. F. Hutton purchased the shares for Zelda Panzirer at a September 29 market price of $7 per share.

The Standard & Poor's tear sheet abstracted information from Allied's annual report for the fiscal year ending March 31, 1978. The report was issued on August 18, 1978, and allegedly contained numerous misrepresentations and omissions. The principal misrepresentation was the report of profits for that year based in part on receipts from Allied's film, "The Betsy." In fact, Allied had to split those receipts with the film's overseas distributor, United Artists, and thus lost money in 1978. The principal omission was the annual report's failure to include a qualification by Allied's accountants stating their doubts as to Allied's ability to function as a going concern.[1] Allied common stock closed at

1. Plaintiff's amended complaint alleges that Price Waterhouse originally included in its certification of Allied's statements a qualification as to Allied's ability to function as a going concern. The complaint alleges that the qualification was removed from the certification before the annual report was published.

$2⅞ per share the day the annual report was issued. It peaked at $7⅜ per share on October 2, 1978,[2] and declined thereafter. Allied filed a Chapter XI petition in bankruptcy on April 4, 1979.

Zelda Panzirer never saw the annual report. In her complaint, she alleges that she relied on the "integrity of the market." She asserts that the annual report affected the market, and therefore she had relied on the report through her reliance on the integrity of the market. Judge Motley, however, found that plaintiff "primarily" relied on the The Wall Street Journal column about Allied's prospects in the video cassette market and that plaintiff placed only secondary reliance on the integrity of the market. She held that secondary reliance was insufficient to support a 10b-5 claim. We cannot agree. We find no support in the law for the district court's distinction between primary and secondary reliance.

The function of requiring the plaintiff to show reliance in a 10b-5 action is to permit only those injured by fraud to sue. If plaintiff can link her injury to defendant's fraud by showing the fraud was a "substantial" or "significant contributing cause," plaintiff has shown sufficient reliance to support her 10b-5 claim. *Wilson* v. *Comtech Telecommunications Corp.*, 648 F.2d 88, 92 (2d Cir. 1981). Plaintiff has on this record stated a sufficient connection between her loss and the allegedly fraudulent annual report to withstand a motion for summary judgment.

As we read the record, Zelda Panzirer's purchase of the Allied stock was caused by her perusal of The Wall Street Journal column. Her knowledge of the price of the stock and her conversation with her broker were merely neutral factors as they presented no impediment to her acting on the favorable notice in The

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2. The annual report was not mailed to Allied shareholders until Friday, September 8, on which date Allied common stock closed at $3⅛. Allied's entry into the video cassette market was announced on Saturday, September 9. Whether the subsequent appreciation in price was due to the annual report or to Allied's entry into the video cassette market is irrelevant to our decision, as we do not depend on Zelda Panzirer's knowledge of the market price. Though Michael Blum stated in his affidavit that he mentioned the activity of Allied common to plaintiff, she nowhere refers to the stock's activity as a reason for her purchase.

Wall Street Journal.[3] Consequently, the plaintiff argues that if Allied's report had been accurate, the stock analysts interviewed by the Journal would not have mentioned the company favorably, the Journal would not have devoted two paragraphs to Allied's prospects in the video cassette market, and plaintiff would not have been led by the article to buy her stock. Defendants have introduced no evidence to contradict this chain of causation. Though, at trial, validity of the chain of causation will be tested, on summary judgment questions about this chain of causation must be resolved in favor of plaintiff, who in the case of a material fraud on the market enjoys a presumption of reliance. Where the plaintiff acts upon information from those working in or reporting on the securities markets, and where that information is circulated after a material misrepresentation or omission, plaintiff has stated a sufficient claim of reliance on the misrepresentation or omission.

Our holding is supported by *Competitive Associates, Inc.* v. *Laventhol, Krekstein, Horwath & Horwath*, 516 F.2d 811 (2d Cir. 1976). In that case, investment manager Akiyoshi Yamada mishandled a Competitive Associates' investment fund. Yamada had previously mishandled another investment fund, but his earlier mistakes had been hidden by allegedly false financial statements certified by the defendant accountants. The district court granted summary judgment to defendants on the ground that because Competitive Associates did not see the financial statements it could not prove reliance on them. We reversed, holding that Competitive Associates need not prove direct reliance, but only causation in fact. That is all Zelda Panzirer need show here. As in *Competitive Associates*, the fact that plaintiff must trace her reliance on defendant's alleged fraud through the reactions of third parties does not vitiate her claim under 10b-5.

3. Plaintiff refers to the price of Allied common stock once in her deposition: "If the price was outrageous, something very high, I wouldn't have been interested. The price was attractive." If anything, her testimony indicates that a lower price accurately reflecting Allied's true financial position might have led her to buy more stock.

Where, as is here alleged, the fraud consists of a failure to disclose, the difficult nature of plaintiff's claim—that if there had been disclosure, plaintiff would not have been harmed—has led the Supreme Court to hold that if the omission is material, reliance upon the omission will be presumed. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153-54 (1972). Proving reliance is necessarily difficult where the fraud has affected the market and damaged the plaintiff only through its effect on the market. Relying on *Affiliated Ute*, this and other circuits do not require direct reliance where the fraud affects the market, on the ground that an investor relies generally on the supposition that the market price is validly set and that no unsuspected fraud has affected the price. *See Ross* v. *A. H. Robins Co.*, 607 F.2d 545, 554 (2d Cir. 1979), *cert. denied*, 446 U.S. 946 (1980); *Blackie* v. *Barrack*, 524 F.2d 891, 906-07 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). As in *Affiliated Ute*, *Blackie* held that the materiality of a fraud creates a presumption of reliance through its presumed effect on the market. *See also* Note, *The Reliance Requirement in Private Actions Under SEC Rule* 10b-5, 88 Harv. L. Rev. 584, 589 (1975).

Our holding is no more than an extension of *Blackie*. Zelda Panzirer did not rely on the integrity of the market price because she did not rely on price, but she did rely on the integrity of the market in producing the information reported in The Wall Street Journal. Just as a material misrepresentation or omission is presumed to affect the price of the stock, so it should be presumed to affect the information "heard on the street" which led Zelda Panzirer to make her losing investment.

Merely because Zelda Panzirer's own claim survives summary judgment, however, does not make her fit to represent a class of Allied investors. Plaintiff appeals from Judge Motley's denial of class certification. Judge Motley ruled that the weakness of plaintiff's case concerning reliance made her claim atypical under Fed. R. Civ. P. 23(a)(3), and also ruled that plaintiff's lack of credibility made her an inadequate class representative under

Fed. R. Civ. P. 23(a)(4). We affirm on the latter ground.[4] Plaintiff's lack of credibility is abundantly clear in the record. She gave no less than four versions of her conversation with her broker. At her deposition, she described the conversation as containing no specific information about Allied. Before signing her deposition, she changed her story to say that Michael Blum had read unspecified information to her from his Standard & Poor's tear sheet. In her affidavit explaining her changes in testimony, she alleged that he had told her that Allied had made money in 1978. After defendants introduced an affidavit from the broker that he had never looked at the financial information on Allied in the tear sheet, Zelda Panzirer introduced a final affidavit alleging that he had read financial information to her from the tear sheet. The credibility of a plaintiff may be considered by the trial judge in determining the plaintiff's adequacy as a class representative. *Kline v. Wolf*, 88 F.R.D. 696, 699-700 (S.D.N.Y. 1981); C. Wright & A. Miller, Federal Practice & Procedure §1766 at 632-34. Judge Motley acted well within her discretion in concluding that Zelda Panzirer's lack of credibility rendered her an inadequate class representative.

Affirmed in part, reversed in part; remanded for proceedings consistent with this opinion.

4. We do not decide whether Zelda Panzirer's weak showing of reliance makes her claim atypical under Fed. R. Civ. P. 23(a)(3), as we find her numerous changes in her testimony sufficient reason to deny class certification.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civ. 3445

ZELDA L. PANZIRER,

Plaintiff,

—against—

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Defendants.

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CONSTANCE BAKER MOTLEY, D. J.

MEMORANDUM OPINION

Four motions are presently before the court in this action: 1) Plaintiff has moved, pursuant to Rule 9(m) of the General Rules of this Court, for leave to reargue plaintiff's motion for class action certification; 2) plaintiff has moved, alternatively pursuant to 28 U.S.C. § 1292(b), for certification of the issue of class adjudication to the Court of Appeals; 3) defendants have moved for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of defendants; and 4) proposed intervenor Paul Block has moved for an order, pursuant to Rule 24 of the Federal Rules of Civil Procedure, granting Paul Block leave to intervene and to serve and file his proposed intervenor's complaint.

BACKGROUND

The amended complaint in this action alleges a violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission's rules and regulations promulgated thereunder, 17 C.F.R. § 240.10b-5. The amended complaint in this action alleges that defendants caused Allied to issue to the investing public false and misleading statements about Allied's financial condition. The allegations relate to Allied's 1978 Annual Report, which included financial statements for the fiscal year ending March 31, 1978.

Plaintiff alleges that in purchasing 500 shares of Allied stock on September 29, 1978, she "relied upon the aforesaid materially false and misleading statements of defendants and/or upon the integrity of the market price of Allied's stock as reflected by the impact of said statements on the market for Allied securities." Plaintiff further alleges that these misrepresentations were part of a scheme to portray falsely Allied's financial condition and to cause Allied's stock to trade at artificially high prices.

On November 6, 1979, plaintiff's deposition was taken by defendants. Plaintiff testified that she was not aware of Allied's financial position at the time she purchased her Allied stock.

Plaintiff testified that she did not see a copy of Allied's 1978 Annual Report prior to her purchase of Allied shares on September 28, 1978. In short, plaintiff received no financial information about Allied. Instead, plaintiff testified that she bought Allied stock because of a newspaper article appearing in the *Wall Street Journal* on the day of her purchase, September 29, 1978. Plaintiff testified that she telephoned her broker, who told her that there was no negative news about Allied. Plaintiff testified that other than the newspaper article and the discussion with her broker, she did not rely on any other information about Allied in making her purchase. With respect to the newspaper article, plaintiff testified:

> I never knew specifically what Allied Artists did. Of course, the name is known to me as being in the film business. I didn't know of any of their subsidiaries or what other business they were involved in. But this article was very interesting because this Mr. Racz gave a glowing report. He said, "Allied Artists, besides having a head start in videotapes and cassettes, is negotiating with the TV networks, other film producers and makers of educational films"—of course I am involved in educational films, as I am a teacher currently not that active, but we have used so many educational films—"to put their films on video cassettes."
>
> "The educational informational area constitutes a tremendous market for video cassettes, says Mr. Racz, adding: 'We continue to be bullish on Allied Artists. It's an attractive turn-around situation.' " End of quote.

Panzirer dep. at 131-32.

On December 21, 1979, during oral argument before the court, plaintiff's attorney noted that defendants had not submitted plaintiff's deposition to her for examination and signing. It was then agreed that defendants would submit plaintiff's deposition to her sometime following the oral argument.

On January 3, 1980, plaintiff signed her deposition, after making numerous changes in her testimony. Accompanying her

signed deposition, as changed, was plaintiff's affidavit which was submitted to explain the "corrections made in [her] deposition transcript prior to the execution thereof."

In her deposition testimony, as "corrected" on January 3, 1980, plaintiff states that her broker read to her from the Standard and Poor's "tear sheet" during their telephone conversation of September 29, 1978. Plaintiff states in her "corrected" deposition testimony that at the time of purchase she knew only what she read in the newspaper article *and* what her broker told her over the phone. Thus, in her "corrected" deposition testimony, plaintiff states that "[a]side from what [she] testified earlier," she wasn't aware of Allied's financial position at the time she purchased and that "[a]side from what she testified earlier," she received no financial information about Allied from her broker. In short, plaintiff now testifies that she bought Allied stock because of the newspaper article and her discussion with her broker.

Memorandum Opinion of January 16, 1980

On January 16, 1980, the court issued a memorandum opinion denying a motion by defendants for summary judgment, and denying a motion by plaintiff for class certification. In denying defendants' motion for summary judgment, the court noted that the presumption of reliance in a "fraud on the market" case "can be rebutted with proof that the market's integrity and the alleged misrepresentations were not material to plaintiffs or that they relied primarily on another source. *Greenspan* v. *Brassler*, 78 F.R.D. 130, 133 (S.D.N.Y. 1978)." The court then explained:

> In the case at hand, there is a genuine issue as to whether the market's integrity and the alleged misrepresentations were material to plaintiff and whether plaintiff relied primarily on another source. In her deposition testimony, plaintiff stated that she asked her broker if he had heard any negative news about Allied. After the broker told plaintiff that there was no negative news about Allied, plaintiff purchased Allied stock. Plaintiff's inquiry to her broker might suggest that the market's integrity *was*

> material to plaintiff. Moreover, in her "corrected" deposition testimony, plaintiff stated that she bought Allied stock because of the newspaper article *and* her discussion with her broker concerning the Standard and Poor's "tear sheet." This "tear sheet" included financial information concerning Allied which had appeared in the 1978 Annual Report. Given plaintiff's "corrected" deposition testimony, there is a genuine issue as to whether plaintiff relied *primarily* on the newspaper article rather than the market's integrity or the alleged misrepresentations. As recognized above, this court has serious reservations regarding the credibility of plaintiff's changes in her deposition testimony. Nevertheless, these issues are best resolved by the jury at trial. In light of the genuine issue as to plaintiff's reliance, a material fact in this action, defendants motion for summary judgment must be denied.

In denying plaintiff's motion for class certification, the court concluded that plaintiff did not meet the requirement of Rule 23(a)(3), relying upon the court's holding in *Greenspan* v. *Brassler, supra,* where the court held that class status must be denied when the putative representative is subject to unique defenses that will unnecessarily prejudice the class's probability of success. In the case at hand, the court explained:

> Rule 23(a)(3) provides that a prerequisite to a class action is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." In the case at hand, the record before the court clearly indicates that plaintiff may be subject to defenses not applicable to other class members. Plaintiff's possible reliance on a newspaper article relating to Allied's video cassette business, rather than on the market's integrity or the alleged misrepresentations in the 1978 Annual Report, raises issues qualitatively different from the questions of individual reliance normally inherent in a fraud on the market suit. Thus, certification of this suit as a class action must be denied since plaintiff is subject to unique defenses that will unnecessarily prejudice the class' probability of success. Although the evidence is insufficient to compel summary judgment in defendants' favor, plaintiff may be subject to the defenses that 1) she relied

primarily on a source other than the market's integrity and the alleged misrepresentations; or 2) that the market's integrity and the alleged misrepresentations were not directly material to plaintiff.

Motion to Reargue Class Action Certification

Plaintiff has moved, pursuant to Rule 9(m) of the General Rules of this court, for leave to reargue plaintiff's motion for class certification. It is well-established that the only proper ground for a motion for reargument is that the court has overlooked "matters or controlling decisions" which, had they been considered, might reasonably have altered the result reached by the court. *United States* v. *International Business Machines Corp.*, 79 F.R.D. 412, 414 (S.D.N.Y. 1978). Plaintiff's motion for reargument must be denied, as plaintiff has not set forth any "matters or controlling decisions" which the court has overlooked.

Plaintiff suggests that the court has overlooked the "unique facts" in *Greenspan* v. *Brassler, supra,* which make the case "clearly inapposite." Plaintiff previously attempted to distinguish *Greenspan* in her briefing on the original class action motion; plaintiff's renewed attempt to distinguish *Greenspan* is insufficient to create a matter overlooked by the court pursuant to Rule 9(m). In any event, plaintiff's assertion that *Greenspan* is distinguishable, or should be somehow limited to its "unique facts," is simply incorrect.

Plaintiff urges the court, in effect, to limit the applicability of *Greenspan* to cases where: 1) the plaintiff relied on the recommendation of a relative in making her purchase; 2) the plaintiff purchased additional shares of the securities at issue after disclosure of the alleged fraud; 3) the plaintiff was totally inattentive to the conduct of the litigation; and 4) there were serious doubts about the adequacy of plaintiff's counsel. Plaintiff's suggested method of reading *Greenspan* would in effect have this court limit virtually every decision of this court to its facts. Nothing in the court's opinion in *Greenspan* suggests, even vaguely, that the *Greenspan* holding is to be so narrowly construed. The court stated in Greenspan that "class status must be denied when, as

here, the putative representative is subject to unique defenses that will unnecessarily prejudice the class's probability of success." 78 F.R.D. at 132. The court did not indicate that this holding is limited to situations where a plaintiff has relied on the recommendations of a brother, as plaintiff seemingly implies.

Plaintiff's attempt to distinguish two cases relied upon by the court in its *Greenspan* opinion is equally unpersuasive. In *Paterson Parchment Paper Co.*, 65 F.R.D. 368, 369 (S.D.N.Y. 1974) the court denied class certification based, in part, upon the fact that defendants had defenses against the proposed class representative which would not necessarily have been available with respect to members of the class whom the individuals sought to represent. Similarly, in *Koos* v. *First National Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974), the Seventh Circuit held that "[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." While the facts in the case at hand may be somewhat different from the facts in *Greenspan*, *Kraus*, or *Koos*, the case at hand is strikingly similar to those cases in that the plaintiff is subject to unique defenses that will unnecessarily prejudice the class's probability of success. While there may exist cases which have allowed class certification in this situation, such cases are contrary to the law of this court as currently reflected in *Greenspan*. *Compare Dorfman* v. *First Boston Corp.*, 62 F.R.D. 466, 472 (E.D. Pa. 1974), *with Zenith Laboratories, Inc.* v. *Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir), *cert denied*, 429 U.S. 828 (1976) ("Since these unique defenses could conceivably become the focus of the entire litigation and divert much of [plaintiff's] attention from the suit as a whole, the remaining members of the class could be severely disadvantaged by [plaintiff's] representation.").

Plaintiff also suggests that the court has overlooked the possibility that *Greenspan* was wrongly decided. Plaintiff previously attempted to argue against the *Greenspan* position in her briefing on the original class action motion. Plaintiff's renewed attempt

to raise similar arguments against the court's position, as articulated in *Greenspan*, is insufficient to create controlling decisions overlooked by the court pursuant to Rule 9(m). In any event, plaintiff's assertion that *Greenspan* was wrongly decided, or is inconsistent with Supreme Court or Second Circuit decisions, is without merit.

Plaintiff is correct to the extent that she asserts that "[i]n determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Nevertheless, it is well-established that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978). Contrary to plaintiff's characterization, the court's *Greenspan* holding endorsed an inquiry into whether the typicality requirement of Rule 23(a)(3) had been met, not whether plaintiffs have stated a cause of action or will prevail on the merits. In both *Greenspan* and in the case at hand, the court is engaging in a class determination which, quite properly, involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Plaintiff is also correct to the extent that she asserts that the trial court can order separate trials on the issue of individual reliance. *See Green* v. *Wolf Corp.*, 406 F.2d, 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). While the possibility of separate trials might allow a plaintiff to satisfy the Rule 23(b)(3)'s requirement of "predominance of common questions," the possibility of separate trials does little, if anything, to satisfy Rule 23(a)(3)'s typicality requirement. In part, the rationale of the *Greenspan* rule is that the unique defenses against the plaintiff could divert much of the plaintiff's attention from the suit as a whole, thus severely disadvantaging the remaining members of the class. *See Zenith Laboratories, Inc.* v. *Carter-Wallace, Inc., supra*, 530 F.2d at 512. While dismissal on the merits

of the class representative's individual claim after trial will not necessarily preclude class recovery, the class may nonetheless be severely prejudiced by the representation of a plaintiff preoccupied with dealing with unique defenses.

The numerous cases offered by plaintiff do not constitute controlling decisions which indicate that *Greenspan* was wrongly decided. In *Korn* v. *Franchard Corp.*, 456 F.2d 1206, 1211 (2d Cir. 1972), for example, the Second Circuit found that the record before the court provided "too feeble a foundation for considering [plaintiff] atypical or unrepresentative on the ground of her lack or reliance." The Second Circuit did not preclude a finding that a plaintiff was atypical or unrepresentative in other cases, such as the present case, where the record was sufficient to support such a finding. In *Greene* v. *Emersons, Ltd.*, [Current] CCH Fed. Sec. L. Rep. ¶97, 267, at 96, 881 (S.D.N.Y. Jan. 30, 1980), the court recently reviewed its *Greenspan* holding. The court explained that in *Greenspan*, plaintiffs' position differed so fundamentally from that of purchasers who relied solely upon market performance, as revealed in public documents, that they could not act as effective representatives of such a class. Thus, *Greene* simply reaffirms the applicability of *Greenspan* to the case at hand, where the record suggests that plaintiff is subject to the unique defense that she did not rely upon market performance in her purchase of Allied stock. *See also In re Commonwealth Oil/Tesoro Petroleum*, MDL No. 347 (W.D. Tex. July 26, 1979); *Sicinski* v. *Reliance Funding Corp.*, 82 F.R.D. 730, 733-34 (S.D.N.Y. 1979); *Tanzer* v. *Sharon Steel Corp.*, [1979 Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,915, at 95,795-96 (S.D.N.Y. June 22, 1979).

In conclusion, plaintiff has failed to set forth "matters or controlling decisions" overlooked by the court which might reasonably have altered the result reached by the court. Accordingly, plaintiff's motion for reargument pursuant to Rule 9(m) must be denied.

Motion for Certification to the Court of Appeals

Plaintiff has moved, pursuant to 28 U.S.C. § 1292(b), for certification of the issue of class adjudication to the Court of Appeals. Section 1292(b) provides, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The earliest case to analyze Section 1292(b) and its requirement that an appeal "may materially advance the ultimate termination of the litigation" was *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431 (3rd Cir. 1958). In *Milbert*, the Third Circuit quoted extensively from the legislative history of Section 1292(b) and concluded that the section "is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation." *Id.* at 433; *accord, Kraus* v. *Board of County Road Commissioners*, 364 F.2d 919 (6th Cir. 1966). Thus, it is clear that "Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit." *United States* v. *Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) [footnote omitted]. *See generally* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 612 (1975) ("efficiency is the sole policy guiding application of the Act"); *id.* at 610-12.

The Second Circuit in *Gottesman* v. *General Motors Corp.*, 268 F.2d 194 (2d Cir. 1959), also reviewed the legislative history

of Section 1292(d) and reached similar conclusions. In *Gottesman*, the Second Circuit noted "the limited and exceptional character of cases to which [Section 1292(b)] applies" and followed the *Milbert* holding that the court's "power must be strictly limited to the precise conditions stated in the law." *Id.* at 196; *accord, Hunt* v. *Mobil Oil Corp.*, 410 F. Supp. 4, 28 (S.D.N.Y. 1975), *aff'd*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977). In accordance with the Second Circuit's opinion in *Gottesman*, this court explained in *United States* v. *International Business Machines Corp.*, 406 F. Supp. 184, 185-86 (S.D.N.Y. 1975), that "certification is proper only under the most unusual circumstances where the immediate appeal might avoid protracted and costly litigation." *Accord, Bobolakis* v. *Compania Panamena Maritima San Gerassima*, 168 F. Supp. 236, 237 (S.D.N.Y. 1958).

The Supreme Court has held that a district court's determination that an action may not be maintained as a class action is not a "final decision" within the meaning of 28 U.S.C. § 1291 and therefore is not appealable as a matter of right. *Cooper & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). The Court has, however, approved discretionary appellate review, pursuant to Section 1292(b), of orders denying class certification. *Id.* at 474-75 & n.27. In fact, the Court has quoted approvingly Judge Friendly's opinion in *Parkinson* v. *April Industries, Inc.*, 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring):

> [T]he best solution is to hold that appeals from the grant or denial of class action designation can be taken only under the procedure for interlocutory appeals provided by 28 U.S.C. § 1292(b).... Since the need for review of class action orders turns on the facts of the particular case, this procedure is preferable to attempts to formulate standards which are necessarily so vague as to give rise to undesirable jurisdictional litigation with concomitant expenses and delay.

Coopers & Lybrand v. *Livesay, supra*, 437 U.S. at 475 n.27. *See also Weisman* v. *Darneille*, 78 F.R.D. 671, 673-74 (S.D.N.Y. 1978).

Accordingly, in the case at hand the court must determine whether, given the facts of this particular case, certification pursuant to Section 1292(b) is appropriate. First, the court must determine whether this case involves a controlling question of law as to which there is substantial ground for difference of opinion. Plaintiff asserts that the controlling question is "whether, in the context of a Rule 10b-5 open-market securities fraud litigation, a class action should be denied solely because the proposed representative may be subject to a defense of non-reliance and therefore could be considered an 'atypical' member of the class." While plaintiff has identified a controlling question of law, the court is of the opinion that there is not substantial ground for difference of opinion as to this question. Plaintiff has cited no decisions by our Court of Appeals or by this court rejecting the *Greenspan* holding. Indeed, *Greenspan* is supported by substantial precedent. As discussed above, neither *Korn* v. *Franchard, supra*, nor *Green* v. *Wolf, supra*, is inconsistent with the court's *Greenspan* holding. Moreover, the court's holding in *Greenspan* and in the case at hand is fully consistent with the Supreme Court's opinion in *Eisen* v. *Carlisle & Jacquelin*. Finally, plaintiff's attempt to suggest a conflict between *Greenspan* and the decisions of the First Circuit is untenable, in light of the Third Circuit's holding in *Smith Laboratories, Inc.* v. *Carter-Wallace, Inc., supra*. ("Since these unique defenses could conceivably become the focus of the entire litigation and divert much of [plaintiff's] attention from the suit as a whole, the remaining members of the class could be severely disadvantaged by [plaintiff's] representation.").

Second, the court must determine whether an immediate appeal may materially advance the ultimate termination of the litigation. As discussed above, certification is proper only under the most unusual circumstances where the immediate appeal might avoid protracted and costly litigation. Plaintiff has not

shown any such unusual circumstances. While plaintiff may be forced to abandon this case because of the relatively small amount of plaintiff's individual claim, this case does not present unusual circumstances or an exceptional case in the context of securities class litigation. Plaintiff suggests that, if there is a reversal of this court's denial of class certification, issues may be resolved which are relevant to all class members. Again, this possibility hardly constitutes unusual circumstances where the immediate appeal might avoid protracted and costly litigation.

In summary, the court is of the opinion that plaintiff has not demonstrated a controlling question of law as to which there is substantial ground for difference of opinion, nor has plaintiff demonstrated that an immediate appeal may materially advance the ultimate termination of the litigation. Accordingly, plaintiff's request for certification pursuant to 28 U.S.C. §1292(b) must be denied.

Renewed Motions for Summary Judgment

Defendants have renewed their motions for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of defendants. These motions are renewed in light of the Supplemental Affidavit of Michael A. Blum, the broker through whom plaintiff purchased her shares of Allied Artists Industries, Inc. ("Allied").

In its memorandum opinion of January 16, 1980, the court reviewed the applicable law and noted that the presumption of reliance in a Section 10(b)action can be rebutted "with proof that the market's integrity and the alleged misrepresentations were not material to plaintiffs *or* that they relied primarily on another source." *Greenspan* v. *Brassler, supra*, 78 F.R.D. at 133 [emphasis added].[1] The court found in its memorandum opinion

1. Plaintiff notes that the formulation of the methods of rebutting the presumption of reliance articulated by Judge MacMahon in *Greenspan* appears to differ somewhat from the formulation of the Ninth Circuit in *Blackie* v. *Barrack*, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976). Of course, the court now recognizes that

that there was a genuine issue as to whether the market's integrity and the alleged misrepresentations were material to plaintiff and whether plaintiff relied primarily on another source.

In particular, the court found that plaintiff's inquiry to her broker, asking if he had heard any negative news about Allied, might suggest that the market's integrity was material to plaintiff. Nothing in the Supplemental Affidavit of Michael A. Blum alters the court's evaluation of this issue.

Under this court's rule of law, as articulated in *Greenspan v. Brassler*, however, defendants may also rebut the presumption of reliance with proof that plaintiff relied primarily on another source. In its January 16, 1980, memorandum opinion, the court noted:

> [I]n her "corrected" deposition testimony, plaintiff stated that she bought Allied Stock because of the newspaper article *and* her discussion with her broker concerning the Standard and Poor's "tear sheet". This "tear sheet" included financial information concerning Allied which had appeared in the 1978 Annual Report. Given plaintiff's "corrected" deposition testimony, there is a genuine issue as to whether plaintiff relied *primarily* on the newspaper article rather than the market's integrity or the alleged misrepresentations.

Panzirer v. *Wolf*, 79 Civ. 3445, slip op. at 9 (S.D.N.Y. Jan. 16, 1980) [emphasis in original].

The Supplemental Affidavit of Michael A. Blum alters the court's analysis of the situation. Blum's Supplemental Affidavit makes clear that while he did discuss the "tear sheet" with plaintiff, he did not discuss the "tear sheet's" financial information:

> I did not discuss the financial statements or condition of Allied Artists with her, and have never read, either to myself or to Mrs. Panzirer, the financial information regarding Allied Artists which is contained in the tear

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the choice between the two formulations presents a close question. However, under principles of stare decisis, the court must follow the formulation it previously adopted in *Greenspan*.

> sheet. I did not discuss Allied's price in relation to its financial condition. I do not remember any discussion as to whether there was negative news about Allied.

Moreover, the Supplemental Affidavit makes clear that Blum's discussion with plaintiff concerned primarily, if not exclusively, Allied's video cassette business:

> In my telephone conversation with Mrs. Panzirer, I read to her from the front side of the Standard & Poor's tear sheet, particularly that portion of the tear sheet relating to the video cassette business. A copy of the tear sheet is attached to the December 18, 1979 affidavit. We discussed the video cassette business and the Wall Street Journal article on that business. I suggested that the recent activity in the stock was probably due to speculation over that business. I told her that I did not follow the movie business because of its volatility and that E. F. Hutton & Co., did not follow Allied Artists.

Thus, the Supplemental Affidavit of Michael A. Blum, when read in conjunction with the rest of the record, establishes that plaintiff relied primarily on another source, rather than the market's integrity or the alleged misrepresentations. Plaintiff relied on a newspaper article concerning Allied's video cassette business and a discussion with her broker, also concerning Allied's video cassette business. Neither plaintiff nor her broker had read the 1978 Annual Report; moreover, neither plaintiff nor her broker had read the "tear sheet's" financial information regarding Allied. While plaintiff relied, in part, upon a discussion with her broker, this discussion did not concern Allied's financial statements or condition. Thus, there is no genuine issue as whether plaintiff relied primarily on another source; the record shows that the presumption or reliance has been rebutted.

Plaintiff has attempted to create a genuine issue of material fact by submitting an affidavit in opposition to defendants'

motions. Incredible at it may seem, plaintiff's affidavit contradicts *both* plaintiff's original deposition testimony *and* plaintiff's "corrected" deposition testimony. Thus, plaintiff has now given three *different* versions of the facts.

The Second Circuit has held that no *genuine* issue of fact is raised when a party attempts to create her own issue of fact by affidavit contradicting her prior testimony. *See Radobenko* v. *Automated Equipment Corp.*, 520 F.2d 540, 544 (9th Cir. 1975). "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Perma Research & Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969); *accord, Bryant* v. *Western Electric Co.*, 572 F.2d 1087, 1088 (5th Cir. 1978) ("It is apparent that the testimony which the plaintiff gave before the summary judgment motion was filed provides the more reliable guide to the truth. . . .").

In her affidavit, plaintiff's latest version of the facts is that her conversation with Blum "was not limited to the video-cassette business of Allied but included some discussion of Allied's earnings and stock price information, and Allied's supposedly improving financial position." Plaintiff's affidavit directly contradicts her deposition testimony, both original and "corrected," in which she repeatedly stated that she did not remember anything concerning earnings or stock price information in her conversation with Blum. The court gives absolutely no credibility to plaintiff's version of the facts in her affidavit, which is suddenly "recalled" after two contradictory versions in her deposition testimony. Not only does the affidavit fail to raise a genuine issue of material fact, but also plaintiff's frequent changes in her testimony show that she would have been unqualified to represent her class pursuant to Rule 23(a)(4).

Plaintiff has also attempted to create a genuine issue of material fact by submitting the affidavit of Leo E. Panzirer, plaintiff's husband. In his affidavit, Leo Panzirer tells of a conversation in

which Blum advised him that, during the telephone conversation between Blum and plaintiff, Blum had reviewed Allied's earnings and stock price information with plaintiff. Under other circumstances, Leo Panzirer's affidavit might suffice to create a genuine issue. But in the case at hand, it should be noted that the telephone conversation at issue involved only Blum and plaintiff. Blum, in his Supplemental Affidavit, and plaintiff, in her original and "corrected" deposition testimony, both denied any discussion of earnings and stock price information. In light of the rather unusual circumstances of this case, Leo Panzirer's testimony will not suffice to create a genuine issue of material fact.

In summary, there is no genuine issue as to the material fact that plaintiff relied primarily on another source, rather than the market's integrity and the alleged misrepresentations. Under the rule of law set forth by the court in *Greenspan* v. *Brassler*, defendants' renewed motions for summary judgment must be granted.

Motion for Leave to Intervene

Proposed intervenor Paul Block has moved for an order, pursuant to Rule 24 of the Federal Rules of Civil Procedure, granting Block leave to intervene and to serve and file his proposed intervenor's complaint. Rule 24(b) of the Federal Rules of Civil Procedure provides for permissive intervention:

> (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In the case at hand, Block's claim is similar to, or almost identical with, that which was asserted by plaintiff in the main action. While none of the original parties press for denial of the intervention motion, the court is of the opinion that intervention should not be permitted pursuant to Rule 24(b). As the court explained in *Washington* v. *Wyman*, 54 F.R.D. 266, 272 (S.D.N.Y. 1971), "the intervenors cannot possibly have a claim or defense in common with a plaintiff who never had a claim."

Accord, Greer v. *Blum*, 462 F. Supp. 619, 625 (S.D.N.Y. 1978); *Turner* v. *First Wisconsin Mortgage Trust*, 454 F. Supp. 899, 913 (E.D. Wis. 1978); *see Andujar* v. *Weinberger*, 69 F.R.D. 690, 697 (S.D.N.Y. 1976). As the Ninth Circuit has noted, "where the original plaintiffs were never qualified to represent the class, a motion to intervene represents a back-door attempt to begin the action anew, and need not be granted." *Lidie* v. *California*, 478 F.2d 552, 555 (9th Cir. 1973). *But see Pikor* v. *Cinerama Productions Corp.*, 25 F.R.D. 92, 95 (S.D.N.Y. 1960) (stockholders' derivative suit); *Truncale* v. *Universal Pictures Co.*, 76 F. Supp. 465, 471 (S.D.N.Y. 1948).

In the case at hand, the court is of the opinion that the motion for leave to intervene should be denied, in light of the granting of summary judgment in favor of defendants in the main action.

Conclusion

For the reasons stated above, the court concludes that: 1) plaintiff's motion for reargument must be denied; 2) plaintiff's motion for certification pursuant to 28 U.S.C. § 1292(b) must be denied; 3) defendants' motions for summary judgment must be granted; and 4) proposed intervenor Block's motion to intervene should be denied.

Dated: New York, New York
April 21, 1980

SO ORDERED.

/s/

.....

CONSTANCE BAKER MOTLEY

U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 CIV. 3445

ZELDA L. PANZIRER,

Plaintiff,

-against-

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER AND PRICE WATERHOUSE & CO.,

Defendants.

APPEARANCES

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Attorneys for Defendants Wolf, Feldman, Lurie, Prager and Proietto

MEMORANDUM OPINION

Defendants have moved for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of defendants and dismissing the amended complaint. Plaintiff has also moved for an order, pursuant to Rule 23 of the Federal Rules of Civil Procedure, determining that plaintiff may maintain this action as a class action on behalf of all purchasers of Allied Artists Industries, Inc. ("Allied") common stock between August 18, 1978, and April 4, 1979.

The amended complaint in this action alleges a violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission's rules and regulations promulgated thereunder, 17 C.F.R. § 240.10b-5. The amended complaint in this action alleges that defendants caused Allied to issue to the investing public false and misleading statements about Allied's financial condition. The allegations relate to Allied's 1978 Annual Report, which included financial statements for the fiscal year ending March 31, 1978.

Plaintiff alleges that in purchasing 500 shares of Allied stock on September 29, 1978, she "relied upon the aforesaid materially false and misleading statements of defendants and/or upon the integrity of the market price of Allied's stock as reflected by the impact of said statements on the market for Allied securities." Plaintiff further alleges that these misrepresentations were part of a scheme to portray falsely Allied's financial condition and to cause Allied's stock to trade at artificially high prices.

On November 6, 1979, plaintiff's deposition was taken by defendants. Plaintiff testified that she was not aware of Allied's financial position at the time she purchased her Allied stock. Plaintiff testified that she did not see a copy of Allied's 1978 Annual Report prior to her purchase of Allied shares on September 28, 1978. In short, plaintiff received no financial information about Allied. Instead, plaintiff testified that she bought Allied stock because of a newspaper article appearing in *The Wall Street*

Journal on the day of her purchase, September 29, 1978. Plaintiff testified that she telephoned her broker, who told her that there was no negative news about Allied. Plaintiff testified that other than the newspaper article and the discussion with her broker, she did not rely on any other information about Allied in making her purchase. With respect to the newspaper article, plaintiff testified:

> I never knew specifically what Allied Artists did. Of course, the name is known to me as being in the film business. I didn't know of any of their subsidiaries or what other business they were involved in. But this article was very interesting because this Mr. Racz gave a glowing report. He said, "Allied Artists, besides having a head start in videotapes and cassettes, is negotiating with the TV networks, other film producers and makers of educational films"—of course I am involved in educational films, as I am a teacher currently not that active, but we have used so many educational films—"to put their films on video cassettes."
>
> "The educational informational area constitutes a tremendous market for video cassettes, says Mr. Racz, adding: 'We continue to be bullish on Allied Artists. It's an attractive, turn-around situation.' " End of quote.

Panzirer dep. at 131-32

On December 21, 1979, during oral argument before the court, plaintiff's attorney noted that defendants had not submitted plaintiff's deposition to her for examination and signing. It was then agreed that defendants would submit plaintiff's deposition to her sometime following the oral argument.

On January 3, 1980, plaintiff signed her deposition, after making numerous changes in her testimony. Accompanying her signed deposition, as changed, was plaintiff's affidavit which was submitted to explain the "corrections made in [her] deposition transcript prior to the execution thereof."

In her deposition testimony, as "corrected" on January 3, 1980, plaintiff states that her broker read to her from the Standard and

Poor's "tear sheet" during their telephone conversation of September 29, 1978. Plaintiff states in her "corrected" deposition testimony that at the time of purchase she knew only what she read in the newspaper article *and* what her broker told her over the phone. Thus, in her "corrected" deposition testimony, plaintiff states that "[a]side from what [she] testified earlier," she wasn't aware of Allied's financial position at the time she purchased and that "[a]side from what she testified earlier," she received no financial information about Allied from her broker. In short, plaintiff now testifies that she bought Allied stock because of the newspaper article and her discussion with her broker.

Plaintiff's Deposition Testimony

Plaintiff's "corrections" in her deposition testimony, while shockingly drastic, nonetheless complied with the requirements of Rule 30(e) of the Federal Rules of Civil Procedure. Rule 30(e) provides:

> When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign.

This court has previously held that Rule 30(e) places no limitations on the type of changes that may be made by a witness before signing his deposition. *Allen & Co.* v. *Occidental Petroleum Corp.*, 49 F.R.D. 337, 340 (S.D.N.Y. 1970). The witness may make changes of any nature, no matter how fundamental or substantial. *Id.*

Defendants argues that, Rule 30(e) notwithstanding, "[p]laintiff's belated contradictions of her prior deposition testimony cannot create a genuine issue of fact to affect a motion for summary judgment." *See, e.g., Bryant* v. *Western Electric Co.*, 572 F.2d 1087, 1088 (5th Cir. 1978); *Radobenko* v. *Automated Equipment Corp.*, 520 F.2d 540, 543-44 (9th Cir. 1975); *Perma Research and Development Co.* v. *Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969). The court recognizes, of course, the plaintiff's "corrections" in her deposition testimony are suspicious, to say the least, especially in light of the fact that the numerous changes were made following the footsteps of defendants' motion for summary judgment. Nevertheless, the changes were made within the restrictions of Rule 30(e), and any issues of plaintiff's credibility in making the changes must be resolved by the jury at trial. While the authorities cited by defendants suggest that a party may not defeat a summary judgment motion by contradicting prior deposition testimony with a subsequent affidavit, these authorities cannot be read as precluding a party from changing deposition testimony prior to signature.

Reliance

The critical issue posed by defendant's motion for summary judgment is whether there are any genuine issues as to any material facts concerning plaintiff's reliance. Of course, in a case involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 153 (1972). "All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Id.* at 153-54. In other words, in a case involving primarily a failure to disclose, there is a presumption of reasonable reliance in order to avoid an overly difficult burden of proof. *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341, 374 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973). This presumption of reliance, however, may be rebutted by defendants, at least under Second Circuit law. *See Titan Group, Inc.* v. *Faggen*, 513 F.2d 234, 239 (2d Cir.), *cert. denied*, 423 U.S. 840

(1975); Note, *The Reliance Requirement in Private Actions under SEC Rule 10b-5*, 88 Harv L. Rev. 584, 600 n.75 (1975). *But see Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp., supra*, 480 F.2d at 399-400 (Mansfield, J., concurring and dissenting).

In the case at hand, any presumption that plaintiff relied upon the alleged misrepresentations or omissions in Allied's 1978 Annual Report have been rebutted by plaintiff's own statements in her deposition testimony, even as "corrected." Plaintiff testified that she did not see a copy of Allied's 1978 Annual Report prior to her purchase of Allied shares. Plaintiff's testimony would seem to rebut any presumption that plaintiff relied upon misrepresentations or omissions in Allied's 1978 Annual Report. *See Vervaeck* v. *Chiles, Heider & Co.*, 578 F.2d 713, 718-19 (8th Cir. 1978); *Tanzer* v. *Sharon Steel Corp.*, [1979 Transfer Binder] Fed. Sec. L. Rep. ¶96,915, at 95,796 (S.D.N.Y. June 22, 1979).

Plaintiff also asserts, however, a "fraud on the market" theory—that is, a theory that plaintiff relied upon the integrity of the market price of Allied's stock, a price reflecting the impact of the allegedly false and misleading statements on the market for Allied securities. In a Section 10(b) action, reliance is presumed once it is established that a material misrepresentation affected the price of stock traded on the open market. *Ross* v. *A. H. Robins Co.*, [Current] Fed. Sec. L. Rep. ¶97,115 (2d Cir. Sept. 24, 1979). This presumption of reliance can be rebutted "with proof that the market's integrity and the alleged misrepresentations were not material to plaintiffs or that they relied primarily on another source." *Greenspan* v. *Brassler*, 78 F.R.D. 130, 133 (S.D.N.Y. 1978).

In the case at hand, there is a genuine issue as to whether the market's integrity and the alleged misrepresentation were material to plaintiff and whether plaintiff relied primarily on another source. In her deposition testimony, plaintiff stated that she asked her broker if he had heard any negative news about Allied. After the broker told plaintiff that there was no negative news

about Allied, plaintiff purchased Allied stock. Plaintiff's inquiry to her broker might suggest that the market's integrity *was* material to plaintiff. Moreover, in her "corrected" deposition testimony, plaintiff stated that she bought Allied stock because of the newspaper article *and* her discussion with her broker concerning the Standard and Poor's "tear sheet." This "tear sheet" included financial information concerning Allied which had appeared in the 1978 Annual Report. Given plaintiff's "corrected" deposition testimony, there is a genuine issue as to whether plaintiff relied *primarily* on the newspaper article rather than the market's integrity or the alleged misrepresentations. As recognized above, this court has serious reservations regarding the credibility of plaintiff's changes in her deposition testimony. Nevertheless, these issues are best resolved by the jury at trial. In light of the genuine issue as to plaintiff's reliance, a material fact in this action, defendants' motion for summary judgment must be denied.[11]

Class Action

Plaintiff has also moved for an order, pursuant to Rule 23 of the Federal Rules of Civil Procedure, determining that plaintiff may maintain this action as a class action. Certificates of this suit as a class action is dependent on plaintiff's proof that each of the requirements of Rule 23(a) has been met. The court concludes that plaintiff does not meet the requirements of Rule 23(a)(3), and accordingly, plaintiff's motion is denied without reaching the question whether plaintiff has met the requirements of Rules 23(a)(1), 23(a)(2), 23(a)(3), or 23(b)(3).

Rule 23(a)(3) provides that a prerequisite to a class action is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." In the case at hand, the record before the court clearly indicates that plaintiff may be subject to defenses not applicable to other class members. Plaintiff's possible reliance on a newspaper article relating to Allied's video cassette business, rather than on the market's integrity or the alleged misrepresentations in the 1978 Annual Report,

raises issues qualitatively different from the questions of individual reliance normally inherent in a fraud on the market suit. Thus, certification of this suit as a class action must be denied since plaintiff is subject to unique defenses that will unnecessarily prejudice the class's probability of success. Although the evidence is insufficient to compel summary judgment in defendants' favor, plaintiff may be subject to the defenses that (1) she relied primarily on a source other than the market's integrity and the alleged misrepresentations or (2) that the market's integrity and the alleged misrepresentations were not directly material to plaintiff.

In this respect, the court's denial of plaintiff's motion for class certification is directly controlled by this court's holding in *Greenspan* v. *Brassler, supra.* In *Greenspan*, a "fraud on the market" case, the court found that factual issues concerning reliance and materiality precluded granting defendants' motion for summary judgment. There was evidence in *Greenspan* that plaintiffs' purchases were made in reliance on the recommendation of a plaintiff's brother, rather than on plaintiff's analysis of the market performance of the stock. In language directly applicable to the case at hand, the court held:

> [A]lthough the evidence is insufficient to compel summary judgment in defendants' favor, it does indicate that plaintiffs may be subject to defenses not applicable to other class members. Plaintiffs' third purchase and their possible reliance on Noah's recommendation raise issues qualitatively different from the questions of individual reliance inherent in a fraud on the market suit. See, *e.g.*, *Green* v. *Wolf Corp.*, 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969); *Mersay* v. *First Republic Corp.*, 43 F.R.D. 465 (S.D.N.Y. 1968). Although those questions normally do not preclude certification, class status must be denied when, as here, the putative representative is subject to unique defenses that will unnecessarily prejudice the class's probability of success. *Koos* v. *First Nat'l Bank*,

496 F.2d 1162 (7th Cir. 1974); *Kraus* v. *Paterson Parchment Paper Co.*, 65 F.R.D. 368 (S.D.N.Y. 1974). But see *Dorfman* v. *First Boston Corp.*, 62 F.R.D. 466 (E.D. Pa. 1974).

78 F.R.D. 132. Applying this Court's standards as set forth in *Greenspan*, in the case at hand plaintiff's motion for class certification must be denied.

Conclusion

For the reasons stated above, defendant's motion for summary judgment is denied, and plaintiff's motion for class certification is also denied.

Dated: New York, New York
January 16, 1980

SO ORDERED.

/s/

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CONSTANCE BAKER MOTLEY

U. S. D. J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the day of January, one thousand nine hundred and eighty-two.

No. 80-7827

ZELDA L. PANZIRER,

Plaintiff-Appellant,

—*v*—

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Zelda L. Panzirer,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/S/

.....

A. DANIEL FUSARO
Clerk

by FRANCIS X. GINDHART
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-eighth day of October, one thousand nine hundred and eighty-one.

Present: HON. J. EDWARD LUMBARD,
HON. IRVING R. KAUFMAN,
Circuit Judges
HON. LAWRENCE W. PIERCE,
District Judge

80-7827

ZELDA L. PANZIRER,
Plaintiff-Appellant,

v.

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in part and affirmed in part in accordance with the opinion of this court.

/s/

.....

A. DANIEL FUSARO
Clerk

by ARTHUR HELLER
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 CIV. 3445

ZELDA L. PANZIRER,

Plaintiff,

—against—

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Defendants.

ORDER

In accordance with the court's opinion of this date, it is hereby

ORDERED that plaintiff's motion, pursuant to Rule 9 (M) of the General Rules of this Court, for leave to reargue plaintiff's motion for class action certification is denied; it is further

ORDERED that plaintiff's motion, pursuant to 28 U.S.C. § 2192(b), for certification of the issue of class adjudication to the Court of Appeals is denied; it is further

ORDERED that defendants' motions for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of defendants is granted; it is further

ORDERED that proposed intervenor Paul Block's motion for an order, pursuant to Rule 24 of the Federal Rules of Civil Procedure, granting Paul Block leave to intervene and to serve and file his proposed intervenor's complaint is denied.

Dated: New York, New York
April 21, 1980

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79 CIV. 3445

ZELDA L. PANZIRER,

Plaintiff.

—against—

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Defendants.

ORDER

In accordance with the court's memorandum opinion of this date, it is hereby

ORDERED that defendants' motions for summary judgment are denied; and it is further

ORDERED that plaintiff's motion for class certification is denied.

Dated: New York, New York
January 16, 1980
SO ORDERED.

/s/.....
CONSTANCE BAKER MOTLEY
U.S.D.J.

Opposition

1

Office - Supreme Court, U.S.
FILED
MAY 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2011

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ZELDA L. PANZIRER,

Petitioner,

v.

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Of Counsel

Question Presented

Whether the District Court abused its discretion in denying class action status on the ground that petitioner's frequent changes in testimony made her an inadequate class representative.

List of Parties

The parties are respondents Price Waterhouse (formerly Price Waterhouse & Co.), Emanuel L. Wolf, Jay N. Feldman, C. Ray Holloway, William V. Lurie, Carl Prager, Julio Proietto and Jack M. Sattinger (defendants-appellees below); and petitioner Zelda L. Panzirer (plaintiff-appellant below). Respondent Price Waterhouse is a partnership.

Price Waterhouse has filed a petition for certiorari with respect to a separate issue in this case. *Price Waterhouse* v. *Zelda L. Panzirer*, No. 81-1998, *petition for cert. filed* April 28, 1982.

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2011

ZELDA L. PANZIRER,

Petitioner,

v.

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Court of Appeals, reported at 663 F.2d 365 (2d Cir. 1981) *sub. nom. Panzirer* v. *Wolf*, is set forth at pages A 1-8 of the Petition. The two opinions of the United States District Court for the Southern District of New York, reported at [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,363 and ¶ 97,251 (S.D.N.Y. 1980), are set forth respectively at pages A 9-26 and A 27-35 of the Petition.

Statement of the Case

The present Petition involves the Court of Appeals' affirmance of a district court's discretionary ruling that petitioner would be an inadequate class representative. Petitioner does not dispute the Court of Appeals' statement of her numerous and contradictory changes in testimony—changes that led to the District Court's conclusion that she would be an inadequate class representative (A 24), and to the Court of Appeals' determination that her "lack of credibility is abundantly clear in the record" (A 8). Instead, petitioner argues that the courts below should not have taken account of these factors in making their class action rulings.

Because the ruling challenged by petitioner was based upon the facts regarding petitioner's changes in testimony, which the District Court found to be "shockingly drastic" (A 30), "suspicious" (A 31) and "incredible" (A 24), we summarize those facts immediately below.

A. Petitioner's Initial Testimony

The complaint charges that Price Waterhouse and the other respondents caused Allied Artists Industries, Inc. ("Allied") to issue false and misleading statements about Allied's financial condition to the investing public in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (A 10). The alleged misrepresentations were contained in Allied's 1978 Annual Report (A 10). Contending that she lost money by purchasing 500 shares of Allied stock, petitioner sought to recover both on her own behalf and on behalf of a class of all purchasers of Allied stock over an eight-month period (A 10, A 28).

At her deposition on November 6, 1979, petitioner testified about the reasons for her purchase of Allied stock.

She conceded that she had not been aware of Allied's financial position at the time she purchased the stock, that she had not seen a copy of Allied's 1978 Annual Report prior to her purchase, and that she had received no financial information about Allied (A 10-11) and no information about Allied's past market prices. Her purchase resulted from her reading a *Wall Street Journal* article that reported on the video cassette business and Allied's forthcoming participation therein (A 11). After reading the article during an automobile trip to Vermont with her husband, petitioner telephoned her broker from a gas station. The broker told her that there was no negative news about Allied, whereupon she placed her order for the Allied stock (A 11).

B. Respondents' Summary Judgment Motions, Petitioner's Changed Testimony, and the District Court's First Opinion

Following petitioner's deposition, respondents moved for summary judgment. During oral argument, petitioner's counsel asserted that the deposition had not been submitted to petitioner for examination and signing, and it was agreed that this should be done following the argument (A 11).

Shortly after the oral argument, petitioner signed her deposition, but only after making numerous changes in her testimony (A 11). Petitioner's signed deposition was accompanied by an affidavit which she submitted to explain the "corrections made in [her] deposition transcript" (A 12).

In her "corrected" deposition testimony, petitioner altered her unequivocal statements that she had been unaware of Allied's financial position and had received no financial information about Allied prior to her purchase. The corrections suggested that petitioner's broker had given her some unspecified information on those subjects by read-

ing to her from a Standard & Poor's "tear sheet" on Allied (A 8, A 11-12). In an affidavit explaining her deposition changes, petitioner presented a third version of her conversation with the broker: she suggested that the broker had told her that Allied had made money in 1978 (*see* A 8).

Based on petitioner's "corrected" testimony, the District Court denied respondents' motions for summary judgment. At the same time, the Court denied petitioner's class certification motion on the ground that petitioner's possible reliance on the newspaper article had made her claim subject to unique defenses that would prejudice the rights of purported class members (A 33-34).

C. Respondents' Renewed Motions, Petitioner's Further Contradictory Changes in Testimony, and the District Court's Second Opinion

Following the denial of their summary judgment motions, respondents contacted petitioner's broker, who stated in a supplemental affidavit that his telephone conversation with petitioner had included no discussion of Allied's financial statements or condition, and that he had never read Allied's financial statements or the financial information in the Standard & Poor's tear sheet (A 22-23). According to the broker, his conversation with petitioner had focused, as had the *Journal* article, on the video cassette business (A 23). On the basis of the broker's supplemental affidavit, respondents again moved for summary judgment. Petitioner in turn moved to reargue the denial of class certification.

In a last effort to save her claim, petitioner advanced yet another version of her story. She submitted a new affidavit which contradicted both her original deposition testimony and her "corrected" deposition testimony (A 24). Contrary to her original and "corrected" deposition testi-

mony, and contrary to her broker's sworn statement, she now claimed that her conversation with her broker had included "some discussion" of specific financial information about Allied, *i.e.*, its earnings, stock prices and financial position (A 8, A 24).

On this record, the District Court denied petitioner's motion to reargue the class certification motion (A 17). In so doing, the court not only reaffirmed the original basis for denying class treatment but also stated that petitioner's repeated changes in testimony demonstrated that she was unqualified to be a class representative pursuant to Rule 23(a)(4) (A 24). In addition, the court granted respondents' motions for summary judgment (A 21-25), in part because a party's post-deposition affidavit, when contrary to the party's deposition testimony, is under established precedent entitled to no evidentiary weight (A 24).

D. The Court of Appeals' Opinion

Petitioner appealed from the District Court's denial of class status and its award of summary judgment. As to the class action issue, the Court of Appeals affirmed the District Court's decision on the ground that petitioner's demonstrated lack of credibility made her an inadequate class representative. The Court of Appeals held as follows:

> *"Plaintiff's lack of credibility is abundantly clear in the record.* She gave no less than four versions of her conversation with her broker.... The credibility of a plaintiff may be considered by the trial judge in determining the plaintiff's adequacy as a class representative. *Kline* v. *Wolf*, 88 F.R.D. 696, 699-700 (S.D.N.Y. 1981); C. Wright & A. Miller, Federal Practice & Procedure § 1766 at 632-34. *Judge Motley acted well within her discretion* in concluding that Zelda Panzirer's lack of credibility rendered her

an inadequate class representative." (A 8) (emphasis supplied).*

There Are No Special and Important Reasons for Granting Certiorari

Under this Court's Rule 17, certiorari may be granted "only when there are special and important reasons therefor." Petitioner has failed to demonstrate any such special and important reasons:

—The question presented does not involve any important issues of federal law. Rather, it involves a discretionary class action determination by the District Court, based upon the application of well-founded principles of law to an unusual fact situation.

—The question as framed by the petitioner mischaracterizes the decision below, and is too broad and vague to warrant any determination by this Court.

—The decision below is not in conflict with any decisions of this Court or any Court of Appeals. Indeed, petitioner cites to no Federal appellate opinion (other than the opinion below) that has addressed the question at issue here, and we are aware of no such opinion.

A. The Question Presented Involves No Important Issue of Federal Law

The issue presented herein is not the broad and vague question of law that petitioner attempts to create. Rather, it involves an application of well-settled law to a specific and unusual factual setting.

The principles applicable to the District Court's class action determination are well developed and have not been

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* The Court of Appeals also reversed the District Court's award of summary judgment (A 3), on the basis of a novel theory of liability that is the subject of a separate petition for certiorari by Price Waterhouse, No. 81-1998.

challenged by petitioner here. In particular, it is clear that the district court has broad discretion in determining whether class status is appropriate, and that its determination will not be overturned absent abuse of discretion. *E.g., Califano* v. *Yamasaki,* 442 U.S. 682, 702-03 (1979); *Shapiro* v. *Midwest Rubber Reclaiming Co.,* 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied,* 449 U.S. 1079 (1981); *Susman* v. *Lincoln American Corp.,* 561 F.2d 86, 90 (7th Cir. 1977); *Hornreich* v. *Plant Industries, Inc.,* 535 F.2d 550, 552 (9th Cir. 1976). It is also well settled that a class representative acts as a fiduciary to the class that he or she purports to represent. *E.g., In re Fine Paper Litigation State of Washington,* 632 F.2d 1081, 1086 (3d Cir. 1980); *Shelton* v. *Pargo, Inc.,* 582 F.2d 1298, 1305-06 (4th Cir. 1978).

Whether a putative class representative would adequately protect the interests of a class is a question of fact depending upon the circumstances of each case. *E.g., Susman* v. *Lincoln American Corp.,* 561 F.2d at 90; 7 C. Wright & A. Miller, *Federal Practice & Procedure* § 1765 at 622 (1972).* As a general rule, the class representative must be of such character as to assure the vigorous and forthright prosecution of the action and the protection of the class. *E.g., Gonzales* v. *Cassidy,* 474 F.2d 67, 75 (5th Cir. 1973) (quoting *Mersay* v. *First Republic Corp.,* 43 F.R.D. 465, 470 (S.D.N.Y. 1968)); *Schatzman* v. *Talley,* 91 F.R.D. 270, 273 (N.D. Ga. 1981); 7 C. Wright & A Miller, *Federal Practice & Procedure* § 1766 at 632-34 (1972). As petitioner concedes (Petition at 12), the class representative must not be in a position that is antagonistic or prejudicial

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* The requirement of adequate representation must be stringently applied because members of the class are bound unless they affirmatively exercise their option to be excluded. *E.g., Susman* v. *Lincoln American Corp.,* 561 F.2d at 89-90; *Albertson's, Inc.* v. *Amalgamated Sugar Co.,* 503 F.2d 459, 463-64 (10th Cir. 1974).

to the class. *E.g., Albertson's, Inc.* v. *Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974); *Schy* v. *Susquehanna Corp.*, 419 F.2d 1112, 1117 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970). Thus, where a purported representative is subject to "unique defenses," the litigation of which may become a focus of the case and prejudice the class, his claim may be viewed as atypical or he may be considered an inadequate class representative. *E.g., Zenith Laboratories, Inc.* v. *Carter-Wallace, Inc.*, 530 F.2d 508, 512 (3d Cir.), *cert. denied*, 429 U.S. 828 (1976); *Koos* v. *First National Bank of Peoria*, 496 F.2d 1162, 1164-65 (7th Cir. 1974).

Applying these principles to the facts of the present case, the District Court found that petitioner's lack of credibility, as demonstrated by her frequent changes in testimony, rendered her an inadequate class representative and fiduciary. The Court of Appeals held that the District Court was "well within" its discretion in reaching this conclusion. Thus, the question presented to this Court is a very narrow one—whether the District Court abused its discretion in concluding, on facts that are undisputed here, that petitioner's lack of credibility rendered her an inadequate class representative. The question presented is neither a novel nor an important question of federal law. It is not an issue that arises often, and the few courts that have addressed the question have held consistently with the courts below (*see* page 10 below).

B. The Question Presented by Petitioner Is Too Broad and Vague to Warrant Determination by This Court

In view of the narrow dimensions of the actual issue raised by the decisions below, petitioner has attempted to create a broader question: whether a district court may deny class certification based on "subjective doubts" about

the putative class representative's "personality" (Petition at 2). Petitioner's statement of the issue is wholly inappropriate because the courts below did not "subjectively" evaluate the "personality" of the petitioner. Rather, they based their class action rulings upon the objective fact that petitioner had told several different versions of her story, and they drew the conclusion—which is difficult if not impossible to contest in the circumstances of this case—that petitioner had thereby demonstrated her lack of credibility. The courts below did not address, let alone decide, the issue that petitioner seeks to present to this Court.

Even if the facts gave rise to the question presented by petitioner, that question would be too broad and vague to warrant determination by this Court. Petitioner does not suggest, and it would be extremely difficult to construct, a workable precedential definition of "objective" (as opposed to "subjective") factors to guide the courts in their class action rulings. Furthermore, as this Court has determined, the class action ruling "generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 469 (1978) (*quoting Mercantile National Bank* v. *Langdeau,* 371 U.S. 555, 558 (1963)). It would be inconsistent with the approach in *Coopers* for this Court to determine, on a generalized and theoretical level rather than on a case-by-case basis, whether the resolution of class action questions should include considerations that are "subjective" and relate to the purported representative's "personality."

C. The Second Circuit's Decision Does Not Conflict With Any Decisions of This Court or Any Court of Appeals

Petitioner argues that the Second Circuit's opinion departs from the analysis, developed by this Court and applied by

other circuits (Petition at 13), regarding adequacy of representation in class actions. However, petitioner does not cite —and we are unaware of—any case decided by this Court, or by any Court of Appeals other than the court below, that has considered the question at issue here. Indeed, the few district court cases on point support the opinions below. *See, e.g., Kline* v. *Wolf*, 88 F.R.D. 696, 699-700 (S.D.N.Y. 1981); *Goldberg* v. *Taylor Wine Co.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,772 (E.D.N.Y. 1979); *Weisman* v. *Darneille*, 78 F.R.D. 669, 671 and n.4 (S.D.N.Y. 1978); *Pearson* v *Borden Metal Co.*, 14 Fair Empl. Prac. Cases (BNA) 644, 647-48 (N.D. Ala. 1976); *Amswiss Int'l Corp.* v. *Heublein, Inc.*, 69 F.R.D. 663, 671 (N.D. Ga. 1975).

Petitioner nevertheless argues that the Second Circuit's opinion departs from the general principle that, in determining the adequacy of representation, a court should focus on whether the plaintiff is in a position antagonistic or prejudicial to the class that he or she seeks to represent (Petition at 12-13). This unsupported argument ignores the principle (noted at page 7 above) that the class representative should be of such character that vigorous and forthright prosecution of the class claims is assured; and ignores the further point that a class representative's lack of credibility may be prejudicial to the purported class, *see Kline* v. *Wolf*, 88 F.R.D. at 699-700. In any event, even if the Second Circuit's ruling did reflect a departure from the principles generally applied in class action determinations (which we dispute), there would be no special and important reason for this Court to decide whether the affirmance of a single district court's discretionary determination conformed with broader legal principles that have not been challenged by the courts below or by any of the parties to the case.

Finally, petitioner seeks to rely upon this Court's opinion in *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363 (1966),

for the proposition that the courts should not impose "too high a standard on a representative plaintiff" (Petition at 13). In *Surowitz*, this Court held that an individual's lack of sophistication concerning economic affairs and the issues underlying the action did not, in and of itself, make that individual an inadequate representative in a shareholders' derivative action. Similarly, in *Lewis* v. *Curtis*, 671 F.2d 779 (3d Cir. 1982), the court held that, in a shareholders' derivative action, the plaintiff could not be held to be an inadequate representative solely because of his lack of knowledge regarding the material facts underlying his claim. Neither case involved a plaintiff's credibility, and neither is remotely applicable to the present case or in any way conflicts with the opinion below.*

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* *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555 (2d Cir. 1968) (Petition at 13 n.2), is equally unrelated to the present case.

Conclusion

For the foregoing reasons, it is respectfully submitted that the present Petition for a writ of certiorari should be denied.

Dated: New York, New York
May 27, 1982

Respectfully submitted,

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Opposition

2

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No. 81-2011

IN THE

Supreme Court of the United States

October Term, 1981

ZELDA L. PANZIRER,

Petitioner,

v.

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Question Presented

Should this Court be called upon to review the affirmance by the Court of Appeals of the District Court's discretionary denial of petitioner's motion for class certification on the ground that, as the Court of Appeals found, "[petitioner's] lack of credibility is abundantly clear in the record"?

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2011

ZELDA L. PANZIRER,

Petitioner,

v.

EMANUEL L. WOLF, JAY N. FELDMAN, C. RAY HOLLOWAY, WILLIAM V. LURIE, CARL PRAGER, JULIO PROIETTO, JACK M. SATTINGER and PRICE WATERHOUSE & Co.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENTS WOLF, FELDMAN, LURIE, PRAGER, PROIETTO AND SATTINGER IN OPPOSITION TO PETITION

Statement of the Case

Petitioner, a purchaser of shares of Allied Artists Industries, Inc. ("Allied"), commenced this action as a purported class action in the United States District Court for the Southern District of New York. In her amended complaint, petitioner alleged violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (A-3).*

---

* References to pages in the Appendix to the Petition appear herein as "(A-)."

The respondents are seven individuals who are sued as directors or officers of Allied and Price Waterhouse & Co., Allied's outside auditors. This brief is submitted on behalf of six of the individual respondents.

Following petitioner's deposition, petitioner moved for class certification. The motion was denied in a January 16, 1980 opinion of the District Court on the ground that petitioner did not satisfy the requirements of Rule 23(a)(3), Fed.R.Civ.P. The District Court found, based upon petitioner's deposition testimony, that she "is subject to unique defenses that will unnecessarily prejudice the class's probability of success" (A-34). In the course of its January 16, 1980 opinion, the District Court also observed that petitioner had made numerous changes in her testimony before signing her deposition transcript and that such so-called "corrections" were "shockingly drastic" and "suspicious, to say the least" (A29-31).

Petitioner moved for reargument of the denial of her class certification motion. In connection with that motion and renewed summary judgment motions by respondents, the District Court found petitioner submitted an affidavit which "directly contradicts her deposition testimony, both original and 'corrected' " (A-24). The District Court not only adhered to its ruling that petitioner had not satisfied the requirements of Rule 23(a)(3), but it also ruled, based on petitioner's frequent changes in her sworn testimony, that petitioner did not satisfy the requirements of Rule 23(a)(4) that a class representative be able "fairly and adequately [to] protect the interests of the class." In its April 21, 1980 opinion denying petitioner's reargument motion and granting the renewed summary judgment motions, the District Court wrote:

> "[Petitioner's] frequent changes in her testimony show that she would have been unqualified to represent her class pursuant to Rule 23(a)(4)". (A-24)

The record established that petitioner, under oath, had given no less than four different versions of material facts

relating to her alleged claim. On appeal, the Court below also so found. In affirming the ruling that petitioner's lack of credibility made her an inadequate class representative under Rule 23(a)(4), the Court below wrote:

> "[Petitioner's] lack of credibility is abundantly clear in the record. She gave no less than four versions of her conversation with her broker. . . . The credibility of a plaintiff may be considered by the trial judge in determining the plaintiff's adequacy as a class representative. [citations omitted] Judge Motley acted well within her discretion in concluding that Zelda Panzirer's lack of credibility rendered her an inadequate class representative." (A-8)

The Court below further stated that in view of the finding of petitioner's inadequacy under Rule 23(a)(4), it did not decide whether petitioner's "weak showing" of reliance rendered her claim atypical under Rule 23(a)(3), Fed. R.Civ.P. (A-8 n. 4). Although the Court below thus left undisturbed the District Court's independent finding that petitioner had not satisfied Rule 23(a)(3), the petition addresses itself solely to Rule 23(a)(4).

Summary of Argument

The questions the petition purports to present are based upon the faulty premise that class certification was denied on the basis of a "subjective evaluation" of petitioner's "character" or "personality." To the contrary, as the Courts below found, the record clearly established petitioner's unquestionable lack of credibility and it was on that basis that the Court below upheld the denial of class certification.

This Court long ago established the principle that one who seeks to maintain an action in a representative capacity assumes a position fiduciary in character and thereby renders relevant the question of integrity, including credibility. Thus, the petition does not present a question which has not been settled by this Court. Nor has petitioner made any showing of a conflict between any circuit courts on the relevance of the lack of credibility of a person who seeks to represent a class.

It is also well-established that a trial court's determination of a class action motion should not be disturbed unless a showing can be made of an abuse of discretion. The petition is silent in this regard and for that reason alone should fail.

ARGUMENT

I

This Court long ago established that the integrity and, hence, the credibility of a party is relevant to a determination whether such party may bring an action in a representative capacity.

Rule 23(a)(4) requires a showing that "the representative parties will fairly and adequately protect the interests of the class." Here, petitioner's lack of credibility is "abundantly clear in the record" (A-8). In such circumstances, as the Courts below found, petitioner is not in a position to discharge the fiduciary obligation of a class representative and cannot satisfy the requirements of Rule 23(a)(4). *Kline* v. *Wolf*, 88 F.R.D. 696, 699-700 (S.D.N.Y. 1981); *Weisman* v. *Darneille*, 78 F.R.D. 669, 671 (S.D.N.Y. 1978); *Norman* v. *Arcs Equities Corp.*, 72 F.R.D. 502, 506 (S.D.N.Y. 1976); *Amswiss International Corp.* v. *Heublein, Inc.*, 69 F.R.D. 663, 669-71 (N.D.Ga. 1975); *see Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

In *Cohen* v. *Beneficial Industrial Loan Corp., supra,* a stockholders' derivative action, this Court termed the standards applicable to one who seeks to bring an action in a representative capacity as being of a "fiduciary character". There, this Court wrote:

> "[A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a *fiduciary character.* He sues, not for himself alone, but as a representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity." 337 U.S. at 549. (emphasis added)

Based upon the decisions below, it is clear that petitioner has not satisfied the standards enunciated by this Court in *Cohen.* Nor has petitioner even suggested that the Courts below abused their discretion in denying class certification.* In the absence of any showing of an abuse of discretion, denial of class certification should be left undisturbed. *Green* v. *Philbrook,* 576 F.2d 440, 446 (2d Cir. 1978); *Wright* v. *Stone Container Corp.,* 524 F.2d 1058, 1061 (8th Cir. 1975); *see Vervaeke* v. *Chiles, Heider & Co.,*

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* As has been seen, the District Court's denial of class certification was also based on its finding that petitioner did not satisfy the requirements of Rule 23(a)(3) by reason of the atypicality of her claim and the Court below did not disturb that finding. In order to represent a class a purported representative has the burden of establishing, *inter alia,* that each of the four requirements of Rule 23(a) is satisfied. *E.g., Eisen* v. *Carlisle & Jacqueline,* 391 F.2d 555, 561 (2d Cir. 1968). Hence, wholly apart from the purported issues under Rule 23(a)(4) on which the petition is based, the District Court's finding that petitioner did not satisfy Rule 23(a)(3) —as to which the petition is silent—would, in any event, mandate the denial of class certification.

578 F.2d 713, 719 (8th Cir. 1978); *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 300 (2d Cir. 1969).

In light of this Court's decision in *Cohen, supra,* and the decisions, including the decisions below, which have uniformly followed the principles of *Cohen,* it is respectfully submitted that the petition fails to establish any need or reason for review by this Court of the denial of class certification.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that petitioner Zelda L. Panzirer's petition for a writ of certiorari should be denied.

Respectfully submitted,

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